No. 92-1956

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONER'S REPLY BRIEF

RALPH G. WELLINGTON*
NANCY WINKELMAN
BARRY L. REFSIN
Attorneys for Petitioner

**Counsel of Record*

SCHNADER, HARRISON,
SEGAL & LEWIS
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2000

BRUCE B. WILSON
LUCY S.L. AMERMAN
THOMAS J. WAMSER
CONSOLIDATED RAIL
CORPORATION
2001 Market St.
Philadelphia, PA 19103

Of Counsel.

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at pages ii-iii of petitioner's petition for a writ of certiorari is incorporated by reference herein. In addition to the companies named in its petition for a writ of certiorari, Consolidated Rail Corporation has an ownership interest in TTX Corporation.

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PETITIONER'S REPLY BRIEF

The briefs in opposition to Consolidated Rail Corporation's ("Conrail") petition for a writ of certiorari are more telling for what they do not say than for what they do say. Respondents James E. Gottshall ("Gottshall") and Alan Carlisle ("Carlisle") completely ignore the profound conflicts among the circuits – conflicts that are well-documented in Conrail's petition for a writ of certiorari – concerning the legal standards to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. Instead, respondents devote their briefs almost

exclusively to their arguments that the decisions of the Court of Appeals for the Third Circuit are correct on their facts.

Of course, Conrail disputes respondents' arguments on the merits and, should this Court grant the petition for a writ of certiorari, will address why the court of appeals' decisions in these cases are contrary both to the prevailing common law standards with regard to recovery for the negligent infliction of emotional distress and to the statutory purposes of the FELA. The significance of respondents' arguments at this juncture, however, is that they provide absolutely no reason why this Court should *not* grant Conrail's petition for a writ of certiorari.

ARGUMENT IN REPLY

I. RESPONDENTS DO NOT AND CANNOT DENY THAT THERE ARE PROFOUND CONFLICTS AMONG THE CIRCUITS CONCERNING THE LEGAL STANDARDS TO BE APPLIED IN DETERMINING WHAT CIRCUMSTANCES MAY GIVE RISE TO A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA.

Respondents studiously avoid Conrail's fundamental point that review by this Court is necessary in view of the conflicting decisions of the courts of appeals concerning the legal standards to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA. The simple fact is that in the wake of this Court's decision in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557

(1987), the courts of appeal have adopted widely varying and irreconcilable approaches in evaluating such claims.[1]

Indeed, the Court of Appeals for the Third Circuit itself recognized that the decisions of the courts of appeals are in hopeless conflict and that the conflicts can be resolved only by further guidance from this Court. In *Gottshall*, the court of appeals noted the "open conflicts among the circuits" (A-20). In *Carlisle*, it noted the need for "clear direction from this circuit and, ultimately, the Supreme Court" (A-84). Similarly, two Justices of this Court have emphasized their belief that "a uniform rule should be announced by this Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914, 914 (1992) (White, J. dissenting, joined by Thomas, J.); *Carroll v. Consolidated Rail Corp.*, 112 S. Ct. 916, 916 (1992) (White, J., dissenting, joined by Thomas, J.).

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[1] Carlisle's claim that Conrail has misconstrued these cases by characterizing them as cases involving wholly emotional injury in order to create a conflict, *see* Carlisle Brief at 7, is misguided, to say the least. All of the cases cited in Conrail's petition, like these two cases, involved alleged physical manifestations of an emotional injury. *See, e.g., Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 704 (7th Cir. 1991) (mental and physical breakdown), *cert. denied*, 112 S. Ct. 914 (1992); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 422 (3d Cir. 1990) (spastic colon, nightmares, tenesmus, involuntary rectal discharge, anxiety, and depression), *cert. denied*, 498 U.S. 1090 (1991); *Elliot v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1227 (4th Cir. 1990) (dizziness, weakness, faintness, stuttering, crying, inability to sleep, headaches, and extreme fatigue); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 425 (6th Cir. 1988) (chest pain, fatigue, depression); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 4 (1st Cir. 1987) (nonfatal heart attack); *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1367 (9th Cir. 1987) (fatal heart attack).

By not disputing the existence of these conflicts among the circuits on this important and recurring issue of federal law, respondents implicitly concede the point. On the basis of these undisputed, profound conflicts alone, this Court should grant Conrail's petition.

II. RESPONDENTS ARE INCORRECT THAT THE COURT OF APPEALS' DECISIONS ARE NARROW, FACT-SPECIFIC, AND UNWORTHY OF THIS COURT'S ATTENTION.

Respondents argue that this Court should deny Conrail's petition for a writ of certiorari because the holdings in these cases are narrow and fact-specific. *See* Gottshall Brief at 26; Carlisle Brief at 7.[2] This assertion both misreads the scope of the holdings and ignores the court of appeals' own express acknowledgment of the significance of these decisions. By rejecting the common law tests, which traditionally circumscribed the availability of damages for the negligent infliction of emotional distress, and by substituting a broad approach that focuses largely on foreseeability, these cases have far-ranging consequences. Indeed, the breadth of the court of appeals' holdings is evident from the very first application of the *Gottshall* holding – *Carlisle*.

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[2] Both respondents utilize an inordinate amount of space in their briefs reciting the particular facts of their cases, including, in Carlisle's case, a recitation of facts not recognized by either the district court or the court of appeals. *See* Gottshall Brief at 3-9; Carlisle Brief at 1-7. However, the profound legal holdings of the court of appeals are entirely independent of the particular facts of the cases.

Moreover, it is clear that the court of appeals was very aware that it was breaking new legal ground in *Gottshall* and *Carlisle*. In *Carlisle*, the court of appeals described its decision in *Gottshall* as "*for the first time* [upholding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact" (A-84) (emphasis added). In *Carlisle*, the court of appeals "*for the first time* [upheld] a claim under the FELA for negligent infliction of emotional distress arising from work-related stress" (A-89) (emphasis added).

Accordingly, respondents' arguments that these cases involve narrow, fact-specific holdings are without merit and are belied by the express language of the court of appeals.

III. RESPONDENTS MISCONSTRUE THE CURRENT STATE OF THE COMMON LAW AND FELA JURISPRUDENCE.

In opposing Conrail's petition, respondents misstate the present state of the law governing recovery for the negligent infliction of emotional distress.

Respondents suggest that the common law of negligent infliction of emotional distress is moving towards an approach resembling that taken by the court of appeals in these cases. *See* Gottshall Brief at 14; Carlisle Brief at 13. Whatever the majority common law rule may be, *cf.* Conrail's Petition at 20 (setting out the three most commonly-used paradigms for recovery of damages for emotional distress), it is clear that it does not in any way resemble the amorphous analysis adopted in *Gottshall* and *Carlisle*. Indeed, those common law courts that have moved in the

direction of the approach of *Gottshall* and *Carlisle* have found the approach utterly unworkable.

In this respect, the lesson of California, the first state to have adopted the bystander test as an exception to the less expansive zone of danger test, is instructive. In the years following *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), in which the Supreme Court of California first adopted a bystander test, the California courts struggled to define the precise parameters of the tort of negligent infliction of emotional distress, producing a body of law even more arbitrary and confusing than the "rigid tests" that respondents argue that the court of appeals was correct to abandon. In response to the confusion created by vaguely defined criteria for the recovery of damages for the infliction of emotional distress, the California Supreme Court finally concluded that establishing concrete limits of liability "is unavoidable if we are to establish meaningful rules for application by litigants and lower courts." *Thing v. La Chusa*, 48 Cal. 3d 644, 666, 771 P.2d 814, 828, 257 Cal. Rptr. 865, 879 (1989). As the court explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

In addition, even Hawaii, the very jurisdiction that Gottshall identifies as having abandoned the traditional common law tests in favor of a *Gottshall*-like test of foreseeability, later retreated from that approach. A year after its decision in *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974) – the decision on which Gottshall relies –

the Hawaii Supreme Court, in *Kelley v. Kokua Sales & Supply, Ltd*, 56 Haw. 204, 532 P.2d 673 (1975) – a decision that Gottshall does *not* cite – recognized that basing recovery for emotional damages solely on foreseeability is unworkable. Although the harm suffered by the plaintiff in *Kelley* was serious and foreseeable, the court concluded that the plaintiff was too far from the scene of the accident to be permitted to recover. It reasoned that "[w]ithout a reasonable and proper limitation of the scope of the duty of care owed by" defendants, defendants "would be confronted with an unmanageable, unbearable and totally unpredictable liability." *Id.* at 208, 472 P.2d at 676.

In addition to joining Gottshall's misconstruction of the common law, Carlisle misstates the law under the FELA. To support his contention that workplace stress claims are cognizable under the FELA, Carlisle relies on a 1960 California state FELA case; a 1979 Fifth Circuit case – a case of doubtful precedential value given the later Fifth Circuit cases cited in Conrail's Petition at 16-17; a 1987 Pennsylvania district court case; and a 1988 Missouri district court case. Carlisle Brief at 14-16. Whatever their precedential value, it is evident that these decisions are anomalous. Indeed, although utilizing varying legal analyses, most lower federal courts have concluded that work-related stress is *not* compensable under the FELA. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 425 (3d Cir. 1990); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), *appeal*

dismissed, 899 F.2d 1360 (3d Cir. 1990); *Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 290 (E.D. Pa. 1991).

Finally, Gottshall suggests that this Court should deny Conrail's petition for a writ of certiorari because the approach of the court of appeals was consistent with this Court's pronouncements in *Buell*. *See* Gottshall Brief at 17. However, it is clear that the court of appeals in these cases stands alone in reading *Buell* to have endorsed a complete abandonment of the common law tests for the recovery of damages for the negligent infliction of emotional distress. This Court should grant Conrail's petition for a writ of certiorari because further direction from this Court is necessary to create a consistent method of legal analysis for claims brought under the FELA for the negligent infliction of emotional distress.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its petition for a writ of certiorari, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

RALPH G. WELLINGTON*
NANCY WINKELMAN
BARRY L. REFSIN
Attorneys for Petitioner

**Counsel of Record*

SCHNADER, HARRISON,
SEGAL & LEWIS
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2000

BRUCE B. WILSON
LUCY S.L. AMERMAN
THOMAS J. WAMSER
CONSOLIDATED RAIL
CORPORATION
2001 Market St.
Philadelphia, PA 19103

Of Counsel.

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